

Before the
POSTAL REGULATORY COMMISSION
WASHINGTON, DC 20268-0001

Freistatt Post Office
Freistatt, Missouri 65654

Docket No. A2013-8

SUR-SURREPLY TO MOTION OF UNITED STATES POSTAL SERVICE TO DISMISS
PROCEEDINGS AND PETITIONER'S REQUEST TO EXTEND TIME FOR FILING
(August 22, 2013)

On August 20, 2013, the Postal Service filed a surreply to the Public Representative's opposition and the Petitioner's request to extend the time for filing.¹ The Postal Service's Surreply raises arguments that are unsupported by law or fact. In particular, the Postal Service argues that "the 30 day time limit embodied in section 404(d)(5) is a limit upon the jurisdiction of the Commission that must be strictly construed." Surreply at 7. The Postal Service also asserts that "there was no Postal Service action or omission which contributed to the delay [in filing Petitioner's claim] or prejudiced any person served by the closing Post Office the ability to timely file an appeal." *Id.* The first argument is not supported by recent Supreme Court holdings. The second assertion misconstrues the legal requirements for equitable tolling and is not supported by the Postal Service's regulations or handbook or by facts in the Administrative Record.

I. TIME PRESCRIPTIONS DO NOT LIMIT THE COMMISSION'S JURISDICTION

In the 23 years since its decision in *Irwin v. Department of Veterans Affairs*, 498 U.S. 89 (1990), the Supreme Court has clearly and repeatedly held that "time prescriptions,

¹ Surreply of United States Postal Service to the Public Representative's Response and Petitioner Schoen's Reply, August 20, 2013 (Surreply).

however emphatic, are not properly typed as ‘jurisdictional.’”² As the Supreme Court explained, the question of whether a time limit is jurisdictional “is not merely semantic but one of considerable practical importance for judges and litigants. Branding a rule as going to a court’s subject-matter jurisdiction alters the normal operation of our adversarial system.” *Henderson*, 131 S.Ct. at 1202. The question in this case is not whether the Commission has jurisdiction of the Petitioner’s appeal; it most certainly does. The question is whether the Commission will exercise its authority to equitably extend the time for filing the Petitioner’s appeal.

II. THE COMMISSION NEED NOT FIND MISCONDUCT TO INVOKE THE DOCTRINE OF EQUITABLE TOLLING

The Commission need not find misconduct on the part of the Postal Service to invoke the doctrine of equitable tolling. Although affirmative misconduct or misleading actions could trigger equitable tolling, so, too, might other “extraordinary and carefully circumscribed circumstances.”³

However, there are facts in the Administrative Record suggesting that actions by the Postal Service did prejudice the ability of Freistatt Post Office customers to file timely appeals (or any appeals at all). The Postal Service repeatedly assured customers of the Freistatt Post Office that notice of its final determination regarding the closing would be posted in the Freistatt Post Office.⁴ It also assured customers that a community meeting would be held

² *Arbaugh v. Y&H Corporation*, 546 U.S. 500, 510 (2006) (some quotation marks omitted), *quoting Scarborough v. Principi*, 541 U.S. 401, 414 (2004). *See also Sebelius v. Auburn Regional Medical Center*, 133 S. Ct. 817, 824 (2013) (explaining that “we have repeatedly held that filing deadlines ordinarily are not jurisdictional”); *Henderson v. Shinseki*, 131 S.Ct. 1197, 1203 (2011) (characterizing filing deadlines as “quintessential claim-processing rules” that should not be described as jurisdictional); *Eberhart v. U.S.*, 546 U.S. 12, 16-19 (2005) (holding that Federal Rule of Criminal Procedure 33(b)(2) is a claim-processing rule that is not jurisdictional); *Kontrick v. Ryan*, 540 U.S. 443, 454 (2004) (holding that certain bankruptcy filing deadlines were not jurisdictional).

³ *Chisholm v. Lanier*, 891 F.Supp.2d 112, 117 (D.D.C. 2012), *quoting Norman v. U.S.*, 467 F.3d 773, 776 (D.C. Cir. 2006). *See also* 51 Am. Jur. 2d *Limitation of Actions* § 153 (2013) (“Unlike the related doctrine of equitable estoppel, equitable tolling requires no fault on the part of the defendant; it does not require wrongful conduct on the part of the defendant, such as fraud or misrepresentation.”).

⁴ For example, one Freistatt resident asked, “If the local post office does close, will residents of Freistatt be given an appropriate notice so arrangements can be made.” Administrative Record, Item 25 at 14. The

before a final determination was made. Administrative Record, Item 3 at 1. Finally, it failed to post notice of the final determination where customers of the Freistatt Post Office were likely to see it.⁵

The Commission should exercise its authority to equitably extend the time for filing Petitioner's appeal, a decision which may be based on the doctrine of equitable tolling or the doctrine of equitable estoppel.

Respectfully submitted,

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Postal Service responded, "Notification will be posted in the Post Office when a Final Determination is made." *Id.* at 12.

⁵ Like 39 U.S.C. § 404(d)(5), Handbook PO-101 emphasizes the actual availability of the notice to customers, requiring posting of the notice at the location providing alternative service, "since that is where customers can see it." Handbook PO-101 §352.1. Unlike customers of the Graves Mill Post Office, which had been suspended for approximately 9 years at the time of the Postal Service's final determination, Freistatt Post Office customers still had reason to believe that notice would be posted at their post office. See Order No. 672, Docket No. A2011-3, Order Dismissing Appeal, February 11, 2011, at 7.